FOR ARGUMENT

Supreme Court, U.S.
FILED
NOV 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1979**

**No. 78-1327**

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,
*Petitioners,*

v.

WILLIAM R. VAN GEMERT, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR THE PETITIONERS

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# Supreme Court of the United States

**October Term, 1979**

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(formerly The Boeing Airplane Company), *et al.*,

*Petitioners,*

v.

WILLIAM R. VAN GEMERT, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR THE PETITIONERS

This reply brief is submitted by Petitioners, The Boeing Company, *et al.* ("Boeing"), in reply to separate briefs filed on behalf of the Respondents in this case by attorneys Stuart D. Wechsler ("Wechsler") and Norman Winer ("Winer").

# ARGUMENT

## I

### As to Respondents' Contention That the Common Benefit Doctrine, Set Forth in *Trustees* v. *Greenough* and *Central Railroad & Banking Co.* v. *Pettus*, Permits an Award of Attorneys' Fees Without Regard to the Degree of Unjust Enrichment That Results From the Attorneys' Actions.

As set forth in Boeing's main brief at 13-14, the rationale of the common benefit corollary to the American Rule on attorneys' fees is that when one person brings a suit at his own expense which results in the enrichment of others as well as himself, it would be unjust to allow these others to pocket their gains without paying a portion of those gains to help defray the legal bills of the individual who created them. Some enrichment is a precondition to the operation of this doctrine because it is only when someone is enriched that there is an inequity for a court to remedy.

Notwithstanding this logic, respondents and the *en banc* majority of the Court of Appeals attempt to extend the common benefit doctrine so that attorneys' fees can be awarded in the complete absence of enrichment, thus stripping this doctrine of its purpose and the prerequisite for its application. This Court has never followed such a course, but instead has consistently reaffirmed and relied on the unjust enrichment rationale for the common benefit doctrine.

#### A. This Court in *Greenough* Relied on the Principle of Unjust Enrichment

In discussing *Trustees* v. *Greenough*, 105 U.S. 527 (1882), Wechsler at 11-12, and the *en banc* majority opinion at 11a, point out that not all the bondholders in that case had yet cashed in their bonds and so had not yet reaped



the benefit of plaintiff's lawsuit. Wechsler at 12 attempts to elevate this fact to a holding by this Court that whether anyone benefits from a lawsuit is irrelevant to whether attorneys' fees can be collected from a fund on which a lawsuit has had some effect.

The fact that all the bondholders had not *yet* benefited, however, was not decisive to this Court in *Greenough*. The decisive fact was that, unlike the non-claiming class members in the instant case, the bondholders in *Greenough* would all *eventually* benefit, as "[t]he administration of the fund for the benefit of the bondholders" would continue as long as there were payments to be made "in payment of coupons still unsatisfied." 105 U.S. at 531. This Court held in *Greenough* that the plaintiff's successful prosecution of a suit on behalf of others to protect a fund was *not* alone enough for him to get attorneys' fees from that fund. It was *also* necessary that the purported beneficiaries "participated in the benefits resulting from [the plaintiff's] proceedings." 105 U.S. at 532.

The attorneys' fees, then, were not taken from the fund simply because there was a fund. They were taken because those who would in fact benefit from the fund would otherwise be unjustly enriched:

> "[I]t cannot be just that in such a suit . . . one alone should bear the burden, when others have the benefit."

105 U.S. at 534, *quoting Thompson* v. *Cooper*, 2 Collyer 87, 90-91, 63 Eng. Rep. 649, 650 (Ch. 1845). This rationale cannot be reconciled with the version of *Greenough* advocated by the *en banc* majority and the Wechsler brief.*

* Winer at 8 makes a similar argument. The cases cited there are inapposite on this point. *Swanson* v. *American Consumer Industries,*

*(footnote continued on following page)*

**B. This Court in *Pettus* Allowed Attorneys' Fees Only From Claims Actually Filed, and Hence Only From Individuals Who Would Otherwise Have Been Unjustly Enriched**

*Central Railroad & Banking Co.* v. *Pettus,* 113 U.S. 116 (1885), is similarly misinterpreted by the respondents. Wechsler at 13 and Winer at 9-10 admit that the plaintiffs and their attorneys in *Pettus* understood that, under the law, the attorneys could only request contribution to their fees from creditors "who accepted the fruits of [the attorneys'] labors by filing claims." 113 U.S. at 125. The respondents argue, nevertheless, that the *Pettus* Court did not approve this statement of the law. In fact, however, after summarizing the evidence, the *Pettus* Court held that if the plaintiffs themselves had agreed to pay their attorneys and had then sued for,

> "such reasonable compensation . . . as the court might allow, in respect of other creditors *filing claims,* the case, it could not well be doubted, would come within the very letter of the decision in *Trustees* v. *Greenough.*"

113 U.S. at 126 (emphasis added).

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*(footnote continued from preceding page)*

517 F.2d 555 (7th Cir. 1975) is a stockholders' derivative suit governed by *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). The rationale of these actions is that the corporation is the beneficiary of suits by stockholders on its behalf and therefore should pay the cost of such suits when they succeed.

*City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448 (2d Cir. 1974), is a settlement case. Such cases are not apposite to the situation before this Court because the parties to a settlement can provide for attorneys' fees from the settlement fund in any way they can agree to, subject to court approval. *E.g., Beecher* v. *Able,* 575 F.2d 1010, 1016 n.3 (2d Cir. 1978); *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1012 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974); *City of Philadelphia* v. *American Oil Co.,* 53 F.R.D. 45, 71 (D. N.J. 1971).



The question in *Pettus* was simply whether that compensation from beneficiaries who filed claims, which *Greenough* had held could be gained by the successful plaintiffs suing on behalf of their attorneys, could also be gained by the attorneys suing the claimants directly. This Court held that "the present case is embraced by the reason of the rule announced in *Trustees* v. *Greenough.*" 113 U.S. at 126. There can be no doubt, then, that this Court in *Pettus* was interpreting *Greenough* to allow payments to attorneys directly from funds recovered, but only to the extent that beneficiaries of those funds actually "fil[ed] claims." 113 U.S. at 126. There was no reason in *Pettus* to alter the unjust enrichment rationale of *Greenough* just because the attorneys, rather than their clients, were suing directly for attorneys' fees.

Applying the *Greenough-Pettus* rationale to the case now before this Court, there can be but one result. Those who are in fact enriched by this lawsuit should pay a portion of their gains to the attorneys who made those gains possible. The respondents' claim, Wechsler at 12, that this result "works inequity to the claiming members of the class, as it is they who will bear the expenses of the nonclaiming class members," is nothing more than a perversion of the common benefit doctrine. Since it is only claiming class members who gain *anything* from this lawsuit,* it is entirely equitable to spread the cost of the lawsuit among them.

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* The class as a whole does not benefit, because that would mean a fluid class recovery in violation of *Van Gemert II,* 51a-52a and *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974). The respondents argue, without support either in law or in the record of this case, that a state may take some unclaimed funds by escheat. Even if this were true, however, these states would not be beneficiaries of this action within the meaning of the common benefit doctrine.

*(footnote continued on following page)*

### C. This Court in *Sprague* v. *Ticonic National Bank* Adhered to the Unjust Enrichment Rationale

In *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), the other case relied on by respondents, Wechsler at 13-14, and the *en banc* majority of the Court of Appeals, 11a, this Court adhered to the unjust enrichment rationale in applying the common benefit doctrine set forth in *Greenough* and *Pettus*. No explicit discussion of the unjust enrichment rationale was undertaken in *Sprague*. Rather, it was assumed, as was natural on the facts of that case, that all fourteen beneficiaries of the plaintiff's action would eventually claim their benefit. As this Court explained the *Sprague* holding in *Hall* v. *Cole*, 412 U.S. 1, 5 n.7 (1973):

> "In reaching this result, the [*Sprague*] Court explained that the beneficiaries of the plaintiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually *would* recover." (emphasis added).

The additional broad *dicta* concerning the powers of an equity court to grant attorneys' fees that appears in *Sprague* has been disapproved by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240,

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*(footnote continued from preceding page)*

This is true both because they would not be intended beneficiaries of respondents' lawsuits, *Hobbs* v. *McLean*, 117 U.S. 567, 581-82 (1886); *Gabrielson* v. *City of Long Beach*, 56 Cal. 2d 224, 363 P.2d 883, 886-87, 14 Cal. Rptr. 651, 654-55 (1961) (Traynor, J.), and because these states could only benefit through the independent efforts of their own lawyers, *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345, 351 (5th Cir. 1966); *Nolte* v. *Hudson Navigation Co.*, 47 F.2d 166, 167-68 (2d Cir. 1931); *In re Estate of Korthe*, 9 Cal. App. 3d 572, 88 Cal. Rptr. 465, 467-68 (1970); *In re Loomis*, 273 N.Y. 76, 81, 6 N.E.2d 103, 105 (1937).



258 n.30 (1975), as set forth in Boeing's main brief at 15-16. Moreover, as Professor Dawson points out, "no such extravagant notions were required, since all the claims of fourteen identified persons" were directed against "clearly segregated specific bonds [which had been] declared . . . subject to an express trust. All that needed to be said was that the court's receiver, who had acquired custody of these and other assets of the bank, had both the means and the duty to insure that all fourteen beneficiaries of the trust were treated alike." Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 Harv. L. Rev. 1597, 1610-11 (1974).

## II

### As to Respondents' Contention That the Criteria for Application of the Common Benefit Doctrine Set Forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society* Apply Only in Cases Dealing With a Non-Monetary Benefit.

The criteria for application of the common benefit doctrine set forth in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) are applied to the instant case in Boeing's main brief at 16-19. These criteria embody the unjust enrichment rationale that respondents seek to avoid. Respondents therefore vainly contend that these criteria do not apply to them because *Alyeska* did not involve a direct monetary benefit. Wechsler at 15-17; Winer at 13-14. Respondents argue that the rationale for attorneys' fees in non-monetary benefit cases emerged full-blown in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), *Hall* v. *Cole*, *supra*, and *Alyeska*, and has no link to the older cases involving monetary benefits.

Respondents' argument is without substance. First, as has been seen, this Court's monetary-benefit cases are soundly tied to an unjust enrichment rationale. Second, this Court in *Alyeska* explicitly stated that the criteria for application of the common benefit doctrine applied to both "common-fund and common-benefit decisions". 421 U.S. at 265 n.39. Finally, the way in which the rationale of the monetary benefit (common fund) cases was extended to non-monetary benefit cases was explained by this Court in *Hall* v. *Cole*, 412 U.S. 1 (1973).

The common benefit exception is described in *Hall* as having "its origins" in the common fund cases "which have traditionally awarded attorneys' fees to the successful plaintiff when [1] his representative action creates or traces a 'common fund,' [2] the economic benefit of which *is* shared by all members of the class." *Id.* at 5 n.7 (emphasis and bracketed numerals added). *Accord, Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 392. This two-fold requirement of successful representation which results in actual enrichment can be directly traced to this Court's opinion in *Greenough.* The Court in *Hall* continued that "the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation 'which corrects or prevents an abuse which would be prejudicial to the rights and interests' of those others," 412 U.S. at 5 n.7, *quoting, Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 396.

Thus, contrary to respondents' arguments, the unjust enrichment rationale dates back to the monetary-benefit cases of *Greenough* and *Pettus,* and was simply extended by this Court to non-monetary benefits. Respondents' fruitless attempt to separate the monetary from non-monetary benefit cases illustrates their lack of comprehension of the rationale for these doctrines.



## III

### As to Respondents' Alternative Contention That Non-Claiming Class Members Have Received a Benefit in This Case.

In the alternative, respondents argue that even if enrichment is required by the common benefit doctrine, non-claiming class members have been enriched because the class attorneys have given them an ephemeral right to receive a share of the recovery. Wechsler at 17; Winer at 14. But this case is concerned only with money that remains unclaimed. Thus it is not concerned with the benefit given to class members who had a right to receive a share of the recovery and exercised it. It is only concerned with the benefit given to class members who have such a right but will *never* exercise it. It is therefore concerned only with rights which are by definition worthless. Only through bootless sophistry can respondents contend that class members who receive such a "right" are unjustly enriched. Given the unjust enrichment rationale for the common benefit doctrine, the conclusion that non-claiming class members receive no benefit is unavoidable.*

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* As if anticipating failure on the common benefit corollary to the American Rule on attorneys' fees, and in a transparent attempt to find some basis for compensation without facing the issues in this case, Wechsler at 27-30 claims for the first time in this litigation, and without a shred of support in the record, that Boeing's "behavior", essentially its decision to issue the debentures in bearer form, warrants an award of attorneys' fees under the bad faith exception to the American Rule. No court in the course of this litigation has ever suggested bad faith on Boeing's part. The record in this case reveals that respondents' accusation is entirely without merit. *See, e.g., Van Gemert I,* 77a & n.23; Case Note [on *Van Gemert I*], 89 Harv. L. Rev. 1016, 1024-27 (1976).

Further, this argument should not be considered by this Court, because it was not raised below or contained in the questions presented to this Court. *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 330 (1967); *J.I. Case Co.* v. *Borak,* 377 U.S. 426, 428-29 (1964).

## IV

### As to Respondents' Contention That Individual Injury Need Not Be Shown Before a Judgment For Damages May Be Had.

Point II of Boeing's main brief at 19-26 presents as an alternate ground for this Court's decision the proposition that because no judgment against Boeing exists for the money due to class members who never claim it, it is only the final amount of claimed funds that constitutes the benefit from which plaintiffs' attorneys can extract their fee. No judgment against Boeing for unclaimed funds exists because class actions, like other civil actions, exist to compensate individual injury, and hence in class actions, as in other civil actions, individual damages must be claimed before they can be assessed against a defendant.

Respondents do not attack this argument directly. They do not cite or discuss authorities on the requirements of non-class actions, they do not cite or discuss this Court's cases holding that class actions must meet the same requirements unless Federal Rule of Civil Procedure 23 otherwise provides, and they do not discuss the holdings or reasoning of the many lower court class action cases, cited in Boeing's main brief at 24-25, which have recognized the need for individual proof of damage by class members in the course of denying class certification.

Instead, respondents try to meet Point II of Boeing's main brief with only unsupported assertions and arguments that assume away the authorities cited by Boeing without facing them.* Without examining the nature of a class

* It is also asserted in passing, Wechsler at 25, that Boeing did not appeal from that sentence of a district court order which stated the total damages that might be collected by class members. Of course

*(footnote continued on following page)*



action judgment, respondents appear to believe, with the *en banc* majority of the Court of Appeals, that such a judgment is "the spoils of . . . victory," 15a, which can be dipped into at will.

#### A. Individual Injury Must Be Shown in Non-Class Actions

Wechsler at 26 asserts that even in non-class actions a plaintiff need not show the fact that he has been injured in order to recover unless he sues under the antitrust laws. This astonishing statement is unfettered by authority of any kind. It also sweeps away a basic proposition of Anglo-American law.

Under the antitrust laws, as with various other statutes, damages are part of the cause of action to be proved at trial. The point at issue in the instant case, however, is not whether damages are part of respondents' cause of action. Respondents could recover nominal damages simply by proving that Boeing committed a legal wrong. Rather, the principle stated in Boeing's main brief is that before a plaintiff can recover anything *beyond* nominal damages, he must establish with some degree of certainty that he personally has sustained the damages for which he seeks recovery. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946); *Palmer* v. *Connecticut Railway & Lighting Co.*, 311 U.S. 544, 561 (1941) ("Certainty in the fact of damage is essential."); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), *citing*

*(footnote continued from preceding page)*

Boeing did appeal from that order, set forth at 39a-42a, and that appeal is presently before this Court. Moreover, the portion which respondents claim Boeing should have specifically highlighted in its appeal is a purely formal paragraph, containing simply a statement of liability and a total amount of damages which had to be stated before any individual class member's damages could be calculated.

*Taylor* v. *Bradley*, 39 N.Y. 129, 4 Abbott Dec. 363 (1868); T. Sedgwick, *Measure of Damages* § 170 at 317-18 (9th ed. 1912) ("A party who claims compensation for a legal injury must show, as part of his case, that he has suffered a loss through the injury"); 1 J. Joyce & H. Joyce, *Treatise on Damages* §§ 2, 75 (1903).

### B. Individual Injury Must Be Shown in Class Actions

The requirement that individual injury be shown before damages are recovered applies equally to class actions. This Court's admonitions, cited in Boeing's main brief at 21-22, that the substantive requisites of sustaining a claim against another party are unchanged in class actions except as set forth in Federal Rule of Civil Procedure 23, support the existence of such a requirement. *See, e.g., Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978). Respondents do not cite, much less discuss, these cases.

The lower court class action cases cited in Boeing's main brief at 24-25 also support this requirement. All of these cases recognized in denying class certification that "[Rule 23] does not eliminate the ultimate need for individual proof of damages by each member of the class." *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 236 n.8 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The same result was reached in a recent district court case in which the plaintiff class prevailed on a securities law claim, and it was held both that attorneys' fees would come only from the amount claimed by the class and that "any amount of the damage award which is not claimed . . . will be returned to the [defendant] corporation." *Elkind* v. *Liggett & Myers, Inc.*, 472 F. Supp. 123, 130, 134 (S.D.N.Y. 1978). Hence, like the cases cited in Boeing's main brief, the *Elkind* court recognized that judgment against a defendant could not be had for amounts owing to class members who never claim.



Respondents' only attempted distinction of these cases is that *some* of them involve larger classes than the case at bar. Wechsler at 26. No reason is or can be given why a substantive requisite of sustaining a claim in a class action should depend on the size of the class.*

### C. Whether a Class Action Is Certified Under Rule 23(b)(1) or Rule 23(b)(3) Is Irrelevant to Whether Injury Must Be Shown

Respondents also suggest that some distinction favorable to them should result from the fact that the instant case was certified as a class action pursuant to Rule 23(b)(1) rather than Rule 23(b)(3). Wechsler at 26-27; Winer at 10-11. The effect of this difference on whether or not class members must prove individual injury is not evident, and respondents provide no enlightenment. The two sections differ as to collateral estoppel effect on future actions, but there is and can be no distinction in the quantum of proof required of class actions certified under these two subsections. Indeed, a class action can be certified pursuant to both these subsections at once. *E.g., Richardson* v. *Hamilton International Corp.*, 62 F.R.D. 413, 423 (E.D. Pa. 1974).

### D. Precedents Involving the Disposition of Money Irrevocably Paid Into Court in Non-Class Action Cases Are Irrelevant

Respondents' other attempts to deal with Boeing's position consist of assuming it away. Wechsler at 20-24 cites non-class action cases for the propositions that defendants have no right to money that has been irrevocably paid in satisfaction of a judgment, and that abandoned property escheats to a state. Boeing's point, however, is that money

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* If there were to be a distinction, it is the large class action, and not the small one, which may be most in need of an exception to requirements of individual proof.

due to non-claiming class members has not been irrevocably paid to, or abandoned by, anyone. Respondents' authorities do not address, much less resolve, this issue. These precedents are irrelevant as long as "[a plaintiff has] no direct right to the fund, and its disposition [is] entirely within the discretion of the same court that created it." *Williametz* v. *Susi,* 489 F.2d 364, 366 (1st Cir. 1973). In this case, as Point II of Boeing's main brief makes clear, class members have no direct right to funds until they make claims.*

## V

### As to Respondents' Contention That Failure to Award Attorneys' Fees From Unclaimed Funds Would Be Unfair to Class Attorneys and to the Class.

Respondents and the *en banc* majority of the Court of Appeals finally argue that taking class attorneys' fees only from funds claimed by the class is unfair both to the class attorneys and to their clients. 14a-16a; Wechsler at 30-33; Winer at 16-17. This argument depends on a unilateral view of fairness that cannot withstand analysis.

As to the class attorneys, it is apparent that the concern expressed for "rationality and fairness in class action fee setting," 14a, Wechsler at 30-31, is one-sided. Factors such

* Respondents' contention that the New York attorneys' lien law, N.Y. Judiciary Law § 475 (McKinney 1968), proves their case, Wechsler at 14-15n.; Winer at 11-12, also begs the question before this Court. The class attorneys, under New York law, may well have a lien in the amount of their fee on the fund from which that fee is taken. The question in this case, however, is how large the fund from which those fees are taken will be. The attorneys' lien law does not resolve this substantive question, as the New York courts have held. *McGinn* v. *Poston,* 62 App. Div. 2d 262, 264, 404 N.Y.S. 2d 906, 908 (3rd Dep't 1978).



as the hours spent or the difficulty of the case pale into insignificance beside the ultimate question that any attorney must answer from his client: what benefit has been achieved. Yet the *en banc* majority states that whether a lawsuit benefits anyone is a "purely fortuitous event" and the respondents do not mention the idea of benefit at all. The "rationality" that they would bring to fee setting does not extend to this central factor.

As to the claiming class members, respondents and the *en banc* majority argue that these class members' claims would be reduced by an unwarranted amount if class attorneys' fees are taken only out of claimed funds. This reduction, however, is not greater in degree than the reduction in the recovery of any plaintiff whose lawyer represents him for a contingent fee. Indeed, the class action device, with fees taken only from claimed funds, acts to limit this reduction. One of the class attorneys in this case, for example, originally brought suit on behalf of clients with potential damages of approximately $50,000. Winer at 5. Because those clients have succeeded in a suit on behalf of a class which has now claimed over $3,000,000 in damages,* those clients' recoveries will be diminished to a far lesser extent than would otherwise have been the case. As to lawsuits in which few class members with very small damages claim, Boeing submits that the risk of diminished reward in these circumstances is appropriately borne by class attorneys, and that this factor will bring into balance the benefits actually achieved with the fees actually awarded.

The third fairness consideration in this case, unremarked by either respondents or the *en banc* majority, is fairness to

* This figure is based on the facts stated in the *Amicus Curiae* Brief of the Special Master. Total class damages with interest amount to approximately $7,000,000, *id.* at 6, and owners of approximately 46% of the total number of debentures have now submitted claims, *id.* at 4, 14.

a class action defendant. The American Rule on attorneys' fees is meant to avoid the burden placed by other nations on losing litigants for having prosecuted or defended a lawsuit. Boeing submits that class action defendants are equally in need of the protection provided by the American Rule.

## CONCLUSION

The arguments of the respondents are without merit. Boeing respectfully submits that the judgment of the Court of Appeals (*en banc*) should be reversed.

Dated: New York, New York
November 8, 1979

Respectfully submitted,

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